

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LISSETTE ASTACIO

vs.

MICHAEL J. ASTRUE ,  
COMMISSIONER OF SOCIAL SECURITY :  
ADMINISTRATION :

CIVIL ACTION

NO. 07-3491

ORDER AND MEMORANDUM

**FILED**  
JUN 11 2008  
MICHAEL E. KUNZ, Clerk  
By \_\_\_\_\_ Dep. Clerk

**AND NOW**, this 11th day of June 2008, after careful review and independent consideration of Plaintiff's Motion for Summary Judgment and Request for Review, Defendant's Response to the Motion for Summary Judgment and Request for Review, the Report and Recommendation of Carol Sandra Moore Wells, United States Magistrate Judge, dated May 19, 2008, and Defendant's Objections to Magistrate Judge's Report and Recommendation, **IT IS ORDERED** as follows:

1. The Report and Recommendation of Carol Sandra Moore Wells, United States Magistrate Judge, dated May 19, 2008, is **APPROVED** and **ADOPTED**;
2. Defendant's Objections to Magistrate Judge's Report and Recommendation are **OVERRULED**;
3. Plaintiff's Motion for Summary Judgment and Request for Review are **GRANTED** to the extent they seek a remand to the Commissioner of the Social Security Administration, and **DENIED** in all other respects; and,
4. The case is **REMANDED** to the Commissioner of the Social Security Administration in accordance with the fourth sentence of 42 U.S.C. § 405(g) for further proceedings consistent with the Report and Recommendation of United States Magistrate Judge Carol Sandra Moore

Wells dated May 19, 2008, including, but not limited to, further testimony from the vocational expert with respect to her testimony concerning jobs at which plaintiff could work with her downgraded residual function capacity limited to lifting or carrying no more than two to three pounds, and her sit/stand/walking limitations.

### **MEMORANDUM**

The procedural history and factual background are set forth in the Report and Recommendation of United States Magistrate Judge Carol Sandra Moore Wells dated May 19, 2008, and will not be repeated in this Memorandum. The Court approves and adopts the Report and Recommendation and writes only to explain its decision to overrule the Objections filed by defendant, Michael J. Astrue, Commissioner of the Social Security Administration (“Commissioner”).

The Commissioner objects to the Magistrate Judge’s Report and Recommendation on the ground that the Magistrate Judge incorrectly understood the testimony of the vocational expert (“VE”). With respect to that objection, the Commissioner argues that it is clear from a reading of the transcript of the VE’s testimony that she understood the ALJ’s questions were based on his “downgrading” of Exhibit 4F, referring to the residual functional capacity assessment by the state agency physician who found that plaintiff could perform the full range of light work (lifting twenty pounds occasionally, ten pounds frequently, standing and walking or sitting for six hours each in an eight hour workday) (Tr. 148, 257). By “downgrading,” the Commissioner takes the position that the ALJ was referring to a reduction in plaintiff’s ability to lift from ten pounds to two to three pounds, and the ability to stand or walk for six hours a day, and addition of the need for the hypothetical individual to have an option to alternate between sitting and standing while working an eight-hour day (Tr. 257).

A review of the transcript discloses that, at best, it is unclear whether the VE understood that her opinion was to be based on those limitations, requiring remand. The transcript discloses that when the ALJ inquired of the VE as to what exertional level the hypothetical individual's limitations would connote, the VE replied "less than sedentary" (Tr. 257). The ALJ then asked the VE to give "some examples" of work that "is within that RFC," but in doing so, the VE identified the jobs that qualified as sedentary, all of which require the ability to lift at least ten pounds. *See*, 20 C.F.R. § 404.1567(a).

The issue raised in the Objections was covered in detail in the Report and Recommendation. The Court agrees completely with that analysis of the Magistrate Judge and her conclusion that the case must be remanded. However, the Court rejects the proposed order of the Magistrate Judge in that it omits reference to the fact that the remand is made under the fourth sentence of 42 U.S.C. § 405(g), and that judgment must be entered in a separate document.

**BY THE COURT:**

  
JAN E. DUBOIS, J.

6/11/08 faxed  
Gordon, Boyle, Reeser